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Sembagavally a/p Murugason v Tee Seng Hock

B HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCVC-132–06 OF 2018
EVROL MARIETTE PETERS JC
10 SEPTEMBER 2019

C *Land Law — Sale of land — Sale and purchase agreement of land — Specific performance — Plaintiff claimed for specific performance of sale and purchase agreement — Defendant counterclaimed for vacant possession of land — Whether plaintiff signed documents other than SPA and Form 14A — Whether plaintiff's signature forged — Whether plaintiff owed monies to* D *defendant — Whether defendant's title indefeasible by virtue of transfer of land — Whether transfer of land illegal/unlawful — National Land Code s 340*

The plaintiff vendor claimed against the defendant purchaser for specific performance of a sale and purchase agreement ('the SPA') for the sale of land E ('the land') that was, for the defendant to pay the alleged purchase price of RM2.7m; or alternatively for the land to be returned to the plaintiff at the defendant's expense. The defendant counterclaimed for vacant possession of the land together with interest; or alternatively for the plaintiff to return the sum of RM2.7m plus RM54,599.99 being the redemption sum for the land. F The plaintiff and the defendant signed the SPA and Form 14A of the National Land Code ('the NLC') for the sale of the land. On 27 November 2017, the defendant redeemed the property from the chargee, Maybank Bhd, and on 2 January 2018, the land was registered in the defendant's name. The plaintiff's case was that after signing the SPA, no payments were forthcoming. She then G contacted the defendant but received no response. However, she subsequently received a notice to vacate the land. The plaintiff then requested for specific performance of the contract. The plaintiff then lodged a police report claiming that her signatures were forged on certain documents to facilitate the transfer of the land to the defendant. The defendant claimed that prior to signing the SPA H and Form 14A, the plaintiff had in fact borrowed a sum of RM2.2m from the defendant. The plaintiff then agreed to transfer the land to offset that loan; and since the land was valued at RM2.7m, an amount of RM500,000 was paid to the plaintiff by the defendant, increasing the loan amount to a total of RM2.7m. According to the defendant, a deed of trust and a power of attorney I were also signed by the plaintiff through which he claimed rendered the defendant the beneficial owner, and the plaintiff a mere bare trustee. The defendant also referred to a letter of acknowledgment which he alleged was signed by the plaintiff, acknowledging receipt of the full purchase price of the land in the amount of RM2.7m. A friendly loan agreement was then entered

into between the plaintiff and defendant, which reflected the loan the plaintiff had taken earlier. However, according to the defendant, it was agreed between them that only the amount of RM2,370,000 was to be repaid in instalments via 12 post-dated cheques that were issued by the plaintiff. Out of the 12 post-dated cheques, only the first two were cleared. As a result of the failure of the plaintiff to repay the loan, the defendant then proceeded with the transfer of the land. The issues for consideration were: (a) whether the plaintiff had signed documents other than the SPA and Form 14A; (b) whether the plaintiff's signature was forged on the documents for the purpose of perpetrating fraud; (c) whether the plaintiff was owing monies to the defendant pursuant to a friendly loan; (d) whether the defendant's title was indefeasible by virtue of the transfer of the land; and (e) whether the transfer of the land was illegal/unlawful.

Held,

(1) The court had no reason to doubt the evidence of SD1 ie the solicitor in charge of the SPA between the plaintiff and defendant. Furthermore, her evidence was not challenged during cross-examination by the plaintiff and thus was deemed to be admitted. SD2 ie a former business partner of the plaintiff was forthright and truthful, and there was nothing dubious about his evidence, as he did not have a motive to lie. Therefore, the plaintiff had in fact signed the other documents (see paras 27–28 & 30–31).

(2) Although SP2 ie the husband of the plaintiff was a person acquainted with the plaintiff's signature, his evidence carried very little weight. SP2 was as a witness with vested interest, as he was authorised, as the husband of the plaintiff herself, to collect the cheque. He provided a bare denial and did not even attempt to explain why his signatures were found on the document. The credibility of SP2 was, therefore, compromised. Hence, the plaintiff had not proved on a balance of probabilities that her signatures were forged (see paras 46–47 & 57).

(3) The post-dated cheques issued by Save Gates Auto Sdn Bhd pointed to the inference that the plaintiff did in fact take the loan and, therefore, had attempted to repay the loan through those cheques. The plaintiff's lack of knowledge of the cheques was unlikely, as she was a director and major shareholder of the company. A loan of RM2.7m was in fact given to the plaintiff by the defendant (see paras 64–66).

(4) The manner in which the land was used as a security for the loan was neither recognised by the NLC, nor was it a *jual janji* transaction. Therefore, the transaction was illegal, against public policy, unconscionable and inequitable. The land was unlawfully acquired, and the application of s 340(2)(c) of the NLC would render the title of the defendant defeasible. In these circumstances, justice could not be

muffled, or operate on silent mode. On the contrary, it had to be uproarious. The defendant's title was, therefore, defeated by both ss 340(2)(c) and 340(4)(b) of the NLC (see paras 76, 79, 81 & 87).

(5) The plaintiff was disallowed from claiming specific performance of such agreement and ordered to return RM2,470,000 which was the sum after deducting RM230,000 from RM2.7m. The defendant was denied vacant possession of the land and the land be reverted unencumbered to the plaintiff by the defendant (see paras 88–89, 92 & 95).

[Bahasa Malaysia summary

Plaintif penjual mendakwa terhadap pembeli defendan untuk pelaksanaan spesifik perjanjian jual beli ('PJB') untuk penjualan tanah ('tanah') yang mana, untuk defendan membayar harga beli yang dikatakan RM2.7 juta; atau secara alternatif untuk tanah itu dikembalikan kepada plaintif atas perbelanjaan defendan. Defendan menuntut balas untuk milikan kosong dengan faedah; atau secara alternatif bagi plaintif untuk mengembalikan jumlah RM2.7 juta ditambah RM54,599.99 sebagai jumlah penebusan bagi tanah itu. Plaintif dan defendan menandatangani PJB dan Borang 14A Kanun Tanah Negara ('KTN') untuk penjualan tanah itu. Pada 27 November 2017, defendan telah menebus harta itu daripada pemegang gadaian, Maybank Bhd, dan pada 2 Januari 2018, tanah itu didaftarkan atas nama defendan. Kes plaintif adalah bahawa selepas menandatangani PJB, tiada pembayaran diberikan. Dia kemudian menghubungi defendan tetapi tidak menerima sebarang jawapan. Walau bagaimanapun, dia kemudiannya menerima notis untuk mengosongkan tanah itu. Plaintif kemudiannya meminta pelaksanaan spesifik kontrak. Plaintif kemudian membuat laporan polis yang mendakwa bahawa tandatangannya dipalsukan pada dokumen tertentu untuk memudahkan pemindahan tanah kepada defendan. Defendan mendakwa bahawa sebelum menandatangani PJB dan Borang 14A, plaintif sebenarnya telah meminjam sejumlah RM2.2 juta daripada defendan. Plaintif kemudian bersetuju untuk memindahkan tanah itu untuk membatalkan pinjaman itu; dan oleh kerana tanah itu bernilai RM2.7 juta, sejumlah RM500,000 dibayar kepada plaintif oleh defendan, meningkatkan jumlah pinjaman kepada sejumlah RM2.7 juta. Menurut defendan, surat ikatan amanah dan surat kuasa wakil juga ditandatangani oleh plaintif yang mana dia mendakwa memberikan defendan sebagai pemilik benefisial, dan plaintif adalah pemegang amanah semata-mata. Defendan juga merujuk kepada surat pengakuan yang didakwa ditandatangani oleh plaintif, mengakui penerimaan harga beli penuh tanah itu dalam jumlah RM2.7 juta. Perjanjian pinjaman mesra kemudiannya dibuat antara plaintif dan defendan, yang mencerminkan pinjaman yang telah diambil oleh plaintif tadi. Walau bagaimanapun, menurut defendan, telah dipersetujui di antara mereka bahawa hanya jumlah RM2,370,000 yang akan dibayar secara ansuran melalui 12 cek tempoh lepas yang dikeluarkan oleh plaintif. Daripada 12 cek tempoh lepas tersebut, hanya dua yang pertama lulus. Hasil daripada

kegagalan plaintif untuk membayar balik pinjaman itu, defendan kemudian meneruskan pemindahan tanah itu. Isu-isu untuk pertimbangan adalah: (a) sama ada plaintif telah menandatangani dokumen selain PJB dan Borang 14A; (b) sama ada tandatangan plaintif dipalsukan pada dokumen untuk tujuan penipuan; (c) sama ada plaintif berhutang wang kepada defendan menurut pinjaman mesra; (d) sama ada hakmilik defendan tidak dapat dibatalkan oleh pemindahan tanah; dan (e) sama ada pemindahan tanah adalah tidak sah/menyalahi undang-undang.

Diputuskan:

(1) Mahkamah tidak mempunyai alasan untuk meragui keterangan SD1 iaitu peguamcara yang bertanggungjawab ke atas PJB antara plaintif dan defendan. Tambahan pula, keterangannya tidak dicabar semasa pemeriksaan balas oleh plaintif dan dengan itu disifatkan sebagai diterima. SD2 iaitu bekas rakan perniagaan plaintif adalah benar dan jujur, dan tidak ada yang meragukan keterangannya, kerana dia tidak mempunyai motif untuk berbohong. Oleh itu, plaintif menandatangani dokumen lain (lihat perenggan 27–28 & 30–31).

(2) Walaupun SP2 iaitu suami plaintif adalah orang yang mengetahui tandatangan plaintif, keterangannya membawa berat yang sangat sedikit. SP2 adalah sebagai saksi dengan kepentingan yang diberikan, sebagaimana dia telah diberi kuasa, sebagai suami kepada plaintif sendiri, untuk mengutip cek itu. Dia memberikan penafian semata-mata dan tidak cuba menjelaskan mengapa tandatangannya ditemui pada dokumen itu. Oleh itu, kredibiliti SP2 telah terjejas. Oleh itu, plaintif tidak membuktikan atas imbangan kebarangkalian bahawa tandatangannya dipalsukan (lihat perenggan 46–47 & 57).

(3) Cek tempoh lepas yang dikeluarkan oleh Save Gates Auto Sdn Bhd menunjuk kepada kesimpulan bahawa plaintif sebenarnya mengambil pinjaman dan, oleh itu, telah berusaha untuk membayar balik pinjaman melalui cek tersebut. Kurangnya pengetahuan plaintif mengenai cek itu adalah tidak mungkin, kerana dia adalah pengarah dan pemegang saham utama syarikat. Pinjaman RM2.7 juta sebenarnya diberikan kepada plaintif oleh defendan (lihat perenggan 64–66).

(4) Cara penggunaan tanah sebagai jaminan untuk pinjaman itu tidak diiktiraf oleh KTN, ataupun transaksi jual janji. Oleh itu, urus niaga tersebut adalah tidak sah, terhadap dasar awam, tidak berpatutan dan tidak saksama. Tanah itu diperolehi secara tidak sah, dan permohonan s 340(2)(c) KTN akan menyebabkan hakimilik defendan dapat disangkal. Dalam keadaan ini, keadilan tidak dapat dibendung, atau beroperasi dalam mod senyap. Sebaliknya, ia perlu dihebohkan. Oleh itu, hakmilik defendan dikalahkan oleh kedua-dua ss 340(2)(c) dan 340(4)(b) KTN (lihat perenggan 76, 79, 81 & 87).

(5) Plaintif tidak dibenarkan menuntut pelaksanaan spesifik perjanjian tersebut dan diperintahkan untuk memulangkan RM2,470,000 yang merupakan jumlah wang selepas ditolak RM230,000 daripada RM2.7 juta. Defendan ditolak milikan kosong tanah itu dan tanah itu dipulangkan tanpa halangan kepada plaintif oleh defendan (lihat perenggan 88–89, 92 & 95).]

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241, FC (refd)

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 1 MLRA 546, CA (refd)

Astana International Sdn Bhd & Ors v RHB Bank Bhd & Ors [2012] 3 MLJ 758, HC (refd)

Bank Bumiputra (M) Bhd v Mohd Ibrahim bin Salleh [2000] 5 MLJ 778, HC (refd)

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62; [1997] 3 CLJ 17, CA (distd)

Browne v Dunn [1893] 6 R 67, HL (refd)

Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1, FC (refd)

Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94; [1997] 1 CLJ 636, FC (refd)

Kuan Chee Jon & Ors v SSF Construction Sdn Bhd [2016] MLJU 1173; [2016] 8 CLJ 521, HC (folld)

Lekchumanan Suppiah & Anor v Ravi Raju [2016] MLJU 1891; [2017] 5 CLJ 168, CA (folld)

Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697; [2017] 5 CLJ 418, FC (refd)

Lim Kar Bee v Duofortis Properties (M) Sdn Bhd [1992] 2 MLJ 281, SC (folld)

Lim Tai Ming & Sons Credit Sdn Bhd v Lim Tuck Thien [2001] 1 MLJ 57; [2001] 1 CLJ 316, CA (refd)

Menta Construction Sdn Bhd v SPM Property & Management Sdn Bhd & Anor [2017] MLJU 526, HC (refd)

Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)

Nina Kung v Wong Din Shin [2006] HKFCA 54, CA (refd)

Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224; [1971] 1 LNS 96, FC (refd)

Pang Ah Chee v Chong Kwee Sang [1985] 1 MLJ 153, FC (refd)

Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd [1986] 2 MLJ 30, SC (refd)

Tan Aik Teck v Tang Soon Chye [2007] 6 MLJ 97; [2007] 5 CLJ 441, CA (refd)

Teoh Ah Cha @ Teoh Sik Sen & Ors v Huatson Sdn Bhd & Ors [2018] MLJU

999; [2018] 1 LNS 1037, HC (refd)
United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182, SC (refd)

Legislation referred to

Contracts Act 1950 s 24(b), (e)
Evidence Act 1950 ss 45, 47, 57, 57(1), 60(1)(a), 67, 68, 73(2)
National Land Code ss 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 340(1), (2), (2)(c), (4)(b), Form 14A

Hussin Othman (Hussin Othman & Co) for the plaintiff.
KS Pang (CK Yap with him) (KS Pang & Co) for the defendant.

Evrol Mariette Peters JC:

THE CLAIM

[1] In a nutshell, the plaintiff's claim against the defendant is for specific performance of a sale and purchase agreement ('SPA') dated 12 April 2016 for the sale of land of 707sqm described as PN 16508 Lot 76511, Mukim Pulai, Daerah Johor Bahru, Johor, together with a double-storey bungalow house addressed at No 1GL-114700, Taman Mutiara Rim 81300 Skudai Johor ('the land'), that is, for the defendant to pay the alleged purchase price of MYR2.7m; or alternatively for the land to be returned to the plaintiff at the defendant's expense.

[2] The defendant counterclaimed for vacant possession of the land together with interest at a rate of 8% per year on its purported purchase price of MYR2.7m from 19 April 2016 until delivery of vacant possession; or alternatively for the plaintiff to return the sum of MYR2.7m plus MYR54,599.99 (being the redemption sum for the land).

THE BACKGROUND FACTS

[3] The plaintiff vendor and the defendant purchaser signed the SPA and Form 14A of the National Land Code ('the NLC') on 12 April 2016 for the sale of the land.

[4] On 27 November 2017, the defendant redeemed the property in the amount of MYR54.599.49 from the chargee, Maybank Bhd, and on 2 January 2018, the land was registered in the defendant's name.

[5] The SPA and Form 14A were attended to by the law firm of Messrs

Chiong & Partners. Messrs Chiong and Partners were initially named as the second defendant in this suit, but via order dated 19 November 2018, the plaintiff's claim against them was struck out.

THE PLAINTIFF'S CASE

[6] The plaintiff's case is that after signing the SPA on 12 April 2016, no payments were forthcoming.

[7] The plaintiff claimed that she then contacted the defendant and Messrs Chiong and Partners but received no response.

[8] However, she subsequently received a notice dated 27 March 2018 from Messrs Chiong and Partners to vacate the land by or before 15 June 2018.

[9] The plaintiff informed her lawyers who proceeded to contact Messrs Chiong and Partners on 6 June 2018, requesting for specific performance of the contract.

[10] The plaintiff then lodged a police report No 007225/18 on 10 August 2018, claiming that her signatures were forged on certain documents to facilitate the transfer of the land to the defendant.

[11] The witnesses for the plaintiff were as follows:

(a) SP1 — the plaintiff herself;

(b) SP2 — Mohanadass a/l Muthukrishnan, the husband of the plaintiff; and

(c) SP3 — Mohd Hashim Roshan bin Ngaspan, a co-director with the plaintiff in Save Gates Auto Sdn Bhd.

THE DEFENDANT'S CASE

[12] The defendant claims that prior to signing the SPA and Form 14A, the plaintiff had in fact borrowed a sum of MYR2.2m from the defendant.

[13] She then agreed to transfer the land to offset that loan; and since the land was valued at MYR2.7m, an amount of MYR500,000 was paid to the plaintiff by the defendant, increasing the loan amount to a total of MYR2.7m.

[14] According to the defendant, a deed of trust and a power of attorney, both dated 12 April 2016, were also signed by the plaintiff through which he

claims rendered the defendant the beneficial owner, and the plaintiff a mere bare trustee.

[15] The defendant also referred to a letter of acknowledgment dated 12 April 2016 which he alleged was signed by the plaintiff, acknowledging receipt of the full purchase price of the land in the amount of MYR2.7m.

[16] A friendly loan agreement dated 19 April 2017 was then entered into between the plaintiff and defendant, which reflected the loan the plaintiff had taken earlier. However, according to the defendant, it was agreed between parties that only the amount of MYR2,370,000 was to be repaid in instalments via 12 post-dated cheques that were issued by the plaintiff.

[17] Out of the 12 post-dated cheques, only the first two, dated 30 April 2017 and 30 May 2017 in the amount of MYR110,000 and MYR120,000 respectively, were cleared. The third and fourth cheques dated 30 June 2017 and 30 July 2017 bounced, and the rest were cancelled.

[18] As a result of the failure of the plaintiff to repay the loan, the defendant then proceeded with the transfer of the land by first, redeeming the land on 27 November 2017 from the chargee bank, Maybank Bhd, and finally registering the title to his name on 2 January 2018.

[19] The witnesses for the defendant were as follows:

(a) SD1 — Gan Hwee Theng, the solicitor in charge of the SPA between the plaintiff and defendant;

(b) SD2 — Hydrus bin Sataniphy @ Saidalvi, a former business partner of the plaintiff, and a friend of SP2; and

(c) SD3 — the defendant himself.

CONTENTIONS, EVALUATION AND FINDINGS

Whether the plaintiff had signed documents other than the SPA and Form 14A

[20] The first issue to address is whether the plaintiff had signed documents other than the SPA and Form 14A. The documents that the plaintiff disputed signing are as follow:

(a) friendly loan agreement ('FLA');

(b) deed of trust ('DOT');

(c) power of attorney ('POA');

(d) letter acknowledging receipt of the sum of MYR2.7m ('LOA');

A (e) letter authorising plaintiff's husband to collect a cheque in the amount of 500,000 ('LAC');

(f) letter authorising Messrs Chiong and Partners to proceed with redemption of the property ('LAR'); and

B (g) letter authorising Messrs Chiong and Partners to make deductions for the payment of quit rent and assessment charges for the property ('LAD').

The law governing signatures

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[21] The starting point on the law governing signatures is found in s 67 of the Evidence Act 1950 ('the Evidence Act') which reads:

> Section 67 — Proof of signature and handwriting of person alleged to have signed or written document produced
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> If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting shall be proved to be in his handwriting.

E **[22]** The Evidence Act prescribes the following methods of proving a signature:

(a) direct evidence of the signing by a witness who says he saw the actual signing take place, pursuant to s 60(1)(a) of the Evidence Act, which reads:

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> Section 60 — Oral evidence must be direct
>
> (1) Oral evidence shall in all cases whatever be direct, that is to say —
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> (a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

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(b) evidence by an attesting witness as prescribed by s 68 of the Evidence Act, which reads:

> Section 68 — Proof of execution of document required by law to be attested
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> H
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> If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence.

I (c) evidence by a 'person acquainted' with the signature of the person by whom the signature is supposed to have been made by virtue of s 47 of the Evidence Act, which reads:

> Section 47 — Opinion as to handwriting when relevant
>
> When the court has to form an opinion as to the person by whom any

document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to have been written or signed, that it was or was not written or signed by that person, is a relevant fact.

Explanation — A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

(d) evidence of the handwriting expert, by virtue of s 45 of the Evidence Act, which reads:

Section 45 — Opinions of experts

(1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts

(e) comparison by the court, of the writing or signature in question with any others proved to the satisfaction of the court to be genuine, by virtue of s 73(2) of the Evidence Act, which reads:

Section 73 — Comparison of signature, writing or seal with others admitted or proved

(2) The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by that person.

[23] The burden of proving that the document is genuine is on the party who produces it, and asserts its validity, regardless of the fact that it was the plaintiff who alleged that the documents were forged. This was set forth by the Federal Court in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697; [2017] 5 CLJ 418 (FC), where it was stated by Jeffrey Tan FCJ at p 741 (MLJ); p 458 (CLJ):

In a civil case, the onus of proving the genuineness of a deed is cast upon the party who produces it and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery or otherwise, the party asserting the deed must satisfy the jury that it is genuine.

[24] In attempting to establish that the plaintiff had in fact signed the documents that she alleged otherwise, the defendant produced his first witness, SD1, Ms Gan Hwee Theng who gave direct evidence of the signing. She claimed she attended personally to the signing by the plaintiff of the FLA, DOT, POA, LAC, LOA, LAR, LAD (collectively 'the other documents').

[25] It is trite law that a person's signature can be recognised or identified by the writer himself or by someone who had witnessed the signing of the signature. This was explained in the Hong Kong Final Court of Appeal case of *Nina Kung v Wong Din Shin* [2006] HKFCA 54 which has been assimilated into Malaysian jurisprudence through several cases including *Teoh Ah Cha @ Teoh Sik Sen & Ors v Huatson Sdn Bhd & Ors* [2018] MLJU 999; [2018] 1 LNS 1037.

[26] The evidence of SD1 is direct evidence as provided in s 60(1)(a) of the Evidence Act that it is the evidence of the witness who saw the plaintiff actually sign the document.

[27] SD1 appeared consistent in her responses throughout the trial. I had no reason to doubt her evidence. Furthermore, her evidence was not challenged during cross-examination by the plaintiff.

[28] Since it was not challenged, her evidence is deemed to be admitted as expounded by the Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 1 MLRA 546, where in reference to *Browne v Dunn* [1893] 6 R 67 (HL), it was stated:

> Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all.

[29] In support of the evidence of SD1 is the evidence of SD2, Hydrus bin Sataniphy @ Saidalvi, who claimed to have had attested the LOA purportedly signed by the plaintiff, acknowledging receipt of the full purchase price of MYR2.7m.

[30] My assessment of SD2 is that he was forthright and truthful, and there was nothing dubious about his evidence, as he did not have a motive to lie.

[31] My finding, therefore, is that the plaintiff had in fact signed the other documents.

Whether the plaintiff's signature was forged on the documents for the purpose of perpetrating fraud

[32] The plaintiff had disputed her signatures on the other documents, and had even lodged police report No 007225/18 on 10 August 2018, claiming that her signatures were forged on such documents used to facilitate the transfer of the land to the defendant.

[33] Since it is my finding that the plaintiff had in fact signed the other documents, it is now for the plaintiff to prove forgery on a balance of probabilities. This is trite law expounded in several cases including *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241 (FC); *Lim Tai Ming & Sons Credit Sdn Bhd v Lim Tuck Thien* [2001] 1 MLJ 57; [2001] 1 CLJ 316 (CA); and *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182 (SC).

[34] The term 'balance of probabilities' was described in *Miller v Minister of Pensions* [1947] 2 All ER 372 as a probability which is 'not so high as required in a criminal case ... more probable than not ... but if the probabilities are equal, it is not discharged'. The standard, therefore, 'does now allow for any guesswork, speculation, surmises or conjecture, that is, acting on a mere possibility' (see *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1 (FC)).

[35] Except for the testimony of the plaintiff's husband, SP2, the plaintiff did not adduce any independent evidence to prove that her signatures were forged.

[36] Counsel for the plaintiff, in citing the Court of Appeal case of *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62; [1997] 3 CLJ 17 (CA) submitted that it is not necessary for the plaintiff to call witnesses to testify to her signatures, and that her evidence alone would suffice.

[37] I am unable to agree with this submission. First, the facts of *Boonsom Boonyanit v Adorna Properties Sdn Bhd* are distinguishable from the present case. In that case, the party disputing the signature gave evidence of the fact that she was not even in the country at the time of the signing, a fact which the court felt was very compelling evidence.

[38] Secondly, the son of the party disputing the signature had given evidence that the signature on the document did not belong to his mother.

[39] Counsel for the defendant argued that the evidence of SP2 regarding the signature of the plaintiff should be disregarded since he is not an expert, as provided for in s 45 of the Evidence Act, which reads:

A Section 45 — Opinions of experts

(1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.

[40] It must be borne in mind, however, that the opinion evidence of an expert witness via s 45 of the Evidence Act is not the only method of proving or disputing signatures.

[41] In giving opinion evidence on handwriting, the court may accept the evidence of persons acquainted with the person whose handwriting is being disputed, as elucidated by the Federal Court in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697 (FC).

[42] This is provided for in s 47 of the Evidence Act, which reads:

Section 47 — Opinion as to handwriting when relevant

When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to have been written or signed, that it was or was not written or signed by that person, is a relevant fact.

[43] A 'person acquainted' is defined in the Explanation to s 47 of the Evidence Act, which reads:

A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

[44] SP2 in his evidence-in-chief stated that he has been married to the plaintiff for 22 years now, and was familiar with her signature. Although not canvassed as such by counsel for the plaintiff, SP2 did meet the requirements of a 'person acquainted' as defined in the Explanation to s 47 of the Evidence Act.

[45] SP2 claimed that the signature on the FLA did not belong to the plaintiff:

15.1 Ianya bukan tandatangan isteri saya (SP1);

15.2 Rujuk m/s 17 dengan m/s 51, ianya berbeza. M/s 17 tandatangan SP1 adalah tegak sedikit tetapi tandatangan di m/s 51 adalah tandatangan yang banyak serong ke kanan;

15.3 Oleh itu dari mata kasar saya katakan tandatangan di m/s 45-51 adalah bukan tandatangan isteri saya (SP1);

[46] It is my view, however, that although SP2 was a person acquainted with the plaintiff's signature, his evidence carries very little weight. SP2 struck me as a witness with vested interest, as he was authorised, as the husband of the plaintiff herself, to collect the cheque in the amount of MYR486,500 (after deducting a certain amount from MYR500,000).

[47] When asked regarding his signature on the document dated 15 April 2016 acknowledging receipt of the cheque, he provided a bare denial. He did not even attempt to explain why his signatures were found on the document. The credibility of SP2 was, therefore, compromised.

[48] Counsel for the plaintiff also urged the court to take judicial notice of the fact that the signatures of the plaintiff on the SPA and Form 14A differ from the signatures on the other documents that the plaintiff claims to be forged.

[49] On this point, it is important to note that judicial notice is the cognisance taken by the court itself of certain matters which are so notorious or clearly established that evidence of their existence is unnecessary. It is taken of various facts which are familiar to any judicial tribunal by their universal notoriety or regular recurrence in the ordinary course of nature or business.

[50] 'When a court takes judicial notice of a fact, it simply means that the court declares that it will find that the fact exists': per Abdul Malik Ishak J (as he then was) in *Bank Bumiputra (M) Bhd v Mohd Ibrahim bin Salleh* [2000] 5 MLJ 778 at p 797.

[51] Facts which the court shall take judicial notice of are found in s 57(1) of the Evidence Act, which reads:

Section 57 — Facts of which court must take judicial notice

(1) The court shall take judicial notice of the following facts:

(a) all laws or regulations having the force of law now or heretofore in force or hereafter to be in force in Malaysia or any part thereof;

(b) all public Acts passed or hereafter to be passed by the Parliament of the United Kingdom, and all local and personal Acts directed by it to be judicially noticed;

(c) articles of war for the armed forces or any visiting force lawfully present in Malaysia;

(d) the course of proceedings in Parliament, in the federal legislatures that existed in Malaysia before Parliament was constituted, in the legislature of any State in Malaysia and in the Parliament of the United Kingdom;

(e) the accession of the Yang di-Pertuan Agong and the accession of the Ruler of any state in Malaysia and the appointment of a Yang di-Pertua Negeri;

(f) the accession and the sign manual of the sovereign for the time being of the United Kingdom;

(g) the seals of all the courts of Malaysia, all seals which any person is authorised to use by any law in force for the time being in Malaysia or any part thereof, all seals of which English courts take judicial notice, and the seals of Courts of Admiralty and maritime jurisdiction and of notaries public;

(h) the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any part of Malaysia, if the fact of their appointment to such office is notified in the Gazette or in any State Gazette;

(i) the existence, title and national flag of every state or sovereign recognised by the *Yang di-Pertuan Agong*;

(j) the ordinary course of nature, natural and artificial divisions of time, the geographical divisions of the world, the meaning of Malay and English words, and public festivals, fasts and holidays notified in the Gazette or in any State Gazette;

(k) the Commonwealth countries;

(l) the commencement, continuance and termination of hostilities between Malaysia or any part of the Commonwealth and any other country or body of persons;

(m) the names of the members and officers of the court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates and other persons authorised by law to appear or act before it;

(n) the rules of the road on the land, sea regulations and the rules of the air;

(o) all other matters which it is directed by any written law to notice.

[52] Section 57 of the Evidence Act merely sets out matters which the court must take judicial notice of but the list therein is not exhaustive. 'The court under s 56 may also take judicial notice of matters which are of common and

general knowledge': per Hashim Yeop Sani FCJ in *Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153 (FC).

[53] The manner in which the court takes judicial notice of facts was expounded by Justice Syed Agil Barakbah in *Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30 at pp 31–32:

> The important point to note is that section 57 does not prohibit the courts from taking judicial notice of other facts not mentioned therein. The matter which the court will take judicial notice must be the subject of common and general knowledge and its existence or operation is accepted by the public without qualification or contention. The test is that the facts involved must be so sufficiently notorious that it becomes proper to assume its existence without proof.

[54] A vital criterion of the fact taken judicial notice of is that sufficient notoriety that must be attached to it, so as to make it proper for the court to assume its existence without proof. With that in mind, it is my view that forged signatures is not a case that is suitable to take judicial notice of.

[55] Even if the court took note of the fact that the signatures differed, it should have been done according to s 73(2) of the Evidence Act, which reads:

> Section 73 — Comparison of signature, writing or seal with others admitted or proved
>
> (2) The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by that person.

[56] This was done in *Astana International Sdn Bhd & Ors v RHB Bank Bhd & Ors* [2012] 3 MLJ 758, where upon the allegation that the chief executive officer's signature on documents were forged, the court directed for him to provide five specimen signatures for comparison with the disputed documents. The court found that the differences between the signatures were obvious and were forgeries even without the aid of an expert. This procedure was not observed on the facts of the present case.

[57] Taking into account the failure of the plaintiff to adduce evidence, and the evidence adduced by the defendant, it is my finding that the plaintiff had in fact signed the other documents, and based on the above findings of fact, the plaintiff had not proved on a balance of probabilities that her signatures were forged.

Whether the plaintiff was owing monies to the defendant pursuant to a friendly loan

A **[58]** The averment by the defendant is that the plaintiff had taken a friendly loan of MYR2.7m. The plaintiff flatly denied it.

[59] There are, however, pieces of circumstantial evidence pointing to the irresistible inference that the plaintiff did in fact take the loan from the B defendant, and therefore owed the defendant monies.

[60] According to SD1, it was SP2 who collected the cheque in the amount of MYR486,500 which in fact made up part of the total amount of the loan C given.

[61] SD2, on the other hand claimed that he was friends with the plaintiff and SP2, and had even introduced them to the defendant because the plaintiff and SP2 were in need of a loan, and hence the loan agreement between the D defendant and the plaintiff.

[62] SD2 further testified that the loan was given to the plaintiff sometime in 2015 in six installments by way of cash.

E **[63]** There is also evidence of the 12 post-dated cheques issued to the defendant, two of which cleared. These cheques were issued by Save Gates Auto Sdn Bhd, a company of which the plaintiff was a majority shareholder and director.

F **[64]** These post-dated cheques issued by Save Gates Auto Sdn Bhd point to the inference that the plaintiff did in fact take the loan and, therefore, had attempted to repay the loan through those cheques.

G **[65]** The plaintiff, however, claimed ignorance of these cheques. I am of the view that her lack of knowledge of these cheques is unlikely, bearing in mind that she is a director and major shareholder of the company.

[66] Based on the evidence above as well as the other documents signed by H the plaintiff, I find that a loan of MYR2.7m was in fact given to the plaintiff by the defendant.

Whether the defendant's title is indefeasible by virtue of the transfer of the land

I **[67]** It is an undisputed fact that the SPA and Form 14A were signed by the plaintiff.

[68] Counsel for the defendant argued that by virtue of having the title registered in the name of the defendant, his title was indefeasible pursuant to

s 340(1) of the National Land Code ('the NLC'), which reads:

> Section 340 — Registration to confer indefeasible title or interest, except in certain circumstances
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease charge or easement is for the being registered, shall subject to the following provisions of this section, be indefeasible.

[69] It must be noted that the principle in s 340(1) of the NLC is a general rule that applies to titles that are registered. There are however, exceptions to the indefeasibility principle which are found in s 340(2) of the NLC, which reads:

> (2) The title or interest of any person or body shall not be indefeasible —
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.
>
> (4) Nothing in this section shall prejudice or prevent —
>
> (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or
>
> (b) the determination of any title or interest by operation of law.

A *Whether the transfer of the land was illegal/ unlawful*

[70] Although it is undisputed that the SPA and Form 14A were signed by the plaintiff, it is important to note that the defendant admitted that the land was merely a security for a friendly loan given to the plaintiff sometime in 2015, prior to signing the SPA and Form 14A.

B

[71] The FLA, although signed in 2017 reflected the loan that was given sometime in 2015. The POA and DOT were to facilitate the realisation of the security.

C

[72] The defendant had no actual intention to purchase the land. He admitted that the land was merely a security for a friendly loan.

D

[73] There was, therefore, no issue of the plaintiff being paid in full by the defendant for the purchase price in the amount of MYR2.7m, since this transaction was never meant to be a sale and purchase of the land to begin with; and the issue of the defendant complying with the terms of the SPA, to pay the purchase price of MYR2.7m, also did not arise since the 'purchase price' was in actual fact the loan given earlier in 2015.

E

[74] At this juncture, it is important to note that the NLC regulates and prescribes the manner in which land should be used as security for a loan.

F

[75] Security transactions recognised under the NLC are charges and statutory liens, found in the provisions from ss 241–281 of the NLC. The security transaction which is not recognised by the NLC but acknowledged by courts as a pure contract of sale is the *jual janji* transaction.

G

[76] The manner in which the land was used as a security for the loan is neither recognised by the NLC, nor is it a *jual janji* transaction. It was a blatant disregard for the provisions of the NLC.

H

[77] The transaction is, therefore illegal, against public policy and defeats the purpose of the law. It falls squarely within the purview of s 24(b) and (e) of the Contracts Act 1950, which reads:

> Section 24 — What considerations and objects are lawful, and what are not
>
> I The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, *it would defeat any law*;
>
> (c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or *opposed to public policy*. (Emphasis added.)

[78] Although illegality was not pleaded, the court cannot sit idly by and watch whilst illegality thumbs its nose at the court. This is following the Supreme Court in *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281, where it was stated that regardless of whether illegality is pleaded, the court does not lend its hand to assist contracts which are ex facie illegal at the trial stage or appellate stage. I am also guided by the Court of Appeal in *Lekchumanan Suppiah & Anor v Ravi Raju* [2016] MLJU 1891; [2017] 5 CLJ 168 and the High Court in *Kuan Chee Jon & Ors v SSF Construction Sdn Bhd* [2016] MLJU 1173; [2016] 8 CLJ 521.

[79] Having found that the SPA and Form 14A were meant to defeat written law, namely the NLC, it is my view that the transaction is illegal, against public policy, unconscionable and inequitable.

[80] Since counsel for the defendant raised the general rule in s 340(1) of the NLC, it behoves me to address the exceptions to the principle of indefeasibility of title, namely s 340(2)(c) of the NLC, which reads:

(2) The title or interest of any person or body shall not be indefeasible —

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

[81] Considering the manner in which the defendant acquired the land, I am of the view that the land was unlawfully acquired, and the application of s 340(2)(c) of the NLC would render the title of the defendant defeasible.

[82] A further exception which renders defeasible the title of the defendant is s 340(4)(b) of the NLC, which reads:

(4) Nothing in this section shall prejudice or prevent —

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest *by operation of law.* (Emphasis added.)

[83] On the application s 340(4)(b), it was held in *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224; [1971] 1 LNS 96, referring to *Das on Torrens System in Malaysia*:

A

> 'operation in law' is a generic term deliberately used by the legislature to grant relief in cases where *contractual or conscientious obligations* (importing a breach of duty to which equity has attached its sanction) are *undertaken by or imposed on the registered proprietor either at law or in equity*. (Emphasis added.)

B

[84] This passage was endorsed by Gopal Sri Ram JCA in the Federal Court case of *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94; [1997] 1 CLJ 636 (FC) and at p 100 (MLJ); p 645 (CLJ), where in explaining that 'Parliament does not legislate in vain' by the use of meaningless words and phrases, his Lordship further explained the meaning of s 340(4)(b) of the NLC in the following words:

C

> In our judgment, Parliament enacted section 340(4)(b) for the purpose of dealing with fact patterns that do not fall squarely within the other exceptions to indefeasibility that appear in the second subsection to s 340 of the Code. While recognising that it is neither possible, nor desirable to predict with any degree of certainty the wide range of cases that, while failing to come within the vitiating categories specified by the second subsection, may yet come within the scope of s 340(4)(b), ...

D

E

[85] It is my view that s 340(4)(b) of the NLC is an alternative provision which applies to render defeasible the registered title of the defendant.

[86] On the facts of the present case, the defendant had registered the land in his name only because the cheques provided for by the plaintiff had failed to clear. He had no intention to purchase the land.

F

[87] In these circumstances, justice cannot be muffled, or operate on silent mode. On the contrary, it has to be uproarious. The defendant's title is, therefore, defeated by both ss 340(2)(c) and 340(4)(b) of the NLC.

G

CONCLUSION

The plaintiff

H

[88] The plaintiff is disallowed from claiming specific performance of such agreement, since it is my view that the SPA is void as it was designed to circumvent the provisions of the law.

I

[89] However, since it is a finding of fact that the plaintiff had taken a loan in the total amount of MYR2.7m, the plaintiff is ordered to return MYR2,470,000 only (with no interest attached whatsoever) which is the sum after deducting MYR230,000 (the total amount paid via the two cheques dated 30 April 2017 and 30 May 2017, which the defendant admitted receiving) from MYR2.7m.

[90] No interest is attached whatsoever to the amount of MYR2,470,000, since a friendly loan is generally a loan given by the lender to the borrower based on mutual trust whereby the borrower is to repay the loan with no interest charged: *Tan Aik Teck v Tang Soon Chye* [2007] 6 MLJ 97; [2007] 5 CLJ 441.

[91] Otherwise, the court may strike down the interest element if such interest is exorbitant, excessive and unconscionable. This principle was held by Lee Swee Seng J (now JCA) in *Menta Construction Sdn Bhd v SPM Property & Management Sdn Bhd & Anor* [2017] MLJU 526.

The defendant

[92] The defendant is denied vacant possession of the land. This prayer cannot be granted in light of the manner he rode roughshod the provisions of the NLC, and the detailed procedures that are prescribed for the purposes of using land as security.

[93] The defendant claims that the sum of MYR54,599,49 should be returned as that was the sum he had to pay when he redeemed the land.

[94] I am of the view, however, that since the SPA was designed to obtain the land as security by circumventing the provisions of the NLC, the court should not extend any form of assistance to the defendant in recovering this sum, as to do so would be condoning the illegality.

[95] For the foregoing reasons, I order that:

(a) the land be reverted unencumbered to the plaintiff by the defendant, at his own expense;

(b) the sum of MYR2,470,000 only (with no interest attached whatsoever) be returned by the plaintiff to the defendant;

(c) interest at the rate of 5%pa on the judgment sum from the date of the decision until the date of payment; and

(d) there will be no order as to costs.

Order accordingly.

Reported by Ahmad Ismail Illman Mohd Razali